PETITION FILED
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No. 83-624

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

MASHPEE TRIBE, et al.
Petitioners

v.

JAMES G. WATT, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL LAWYERS GUILD IN SUPPORT OF GRANTING THE WRIT

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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The Center for Constitutional Rights and other amici hereby respectfully move, pursuant to Rules 36.1 and 42(3) of the Court's Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioner's effort to

obtain review of important procedural and substantive questions concerning the extent to which the Constitution and federal common law protect Indian land title.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amici curiae are Indian rights and civil liberties organizations, which have been involved in issues of the type presented in this case or which believe that denial of due process to Indians ultimately affects the rights of all people in the United States and that equitable application of the law is essential to protecting the rights of all people.

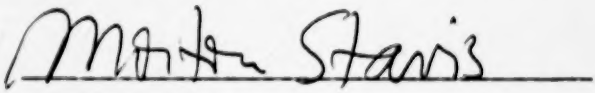
The proposed brief of amici addresses the need for granting the writ from a broad perspective, beyond that presented

by the parties. The proposed brief discusses the national significance of the issues presented and the need for this Court to affirm basic protections historically guaranteed to Indians by the Constitution and federal common law.

Amici believe that the courts below have ruled against petitioners on the basis of ungrounded and inconsistent standards that are wholly outside the framework fashioned by this Court for litigating Indian land title. Amici believe that the erroneous judgments below should be reversed, to permit petitioners their fundamental right to a "day in court."

Amici have requested the consent of the parties to appear. The petitioners have granted such consent, but to date the respondents have not. For the foregoing reasons, amici respectfully move

this Court for leave to file the attached brief amici curiae in support of granting the writ of certiorari.



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STATEMENTS OF INTEREST OF AMICI CURIAE

Center for Constitutional Rights

The Center for Constitutional Rights was born out of the southern civil rights movement of the 1960's. Since that time it has developed legal theories in support of constitutional rights in many areas. In June, 1982, CCR joined as amicus curiae in Hopi Indian Tribe v. Block to support religious rights in the San Francisco Peaks. Other cases have included the Wounded Knee defendants and Leonard Peltier, South Dakota v. Means, and otner lawsuits.

Indian Law Resource Center

The Indian Law Resource Center assists Native Americans in protecting their legal rights, human rights, cultures and religions through a program of research, public education and legal assistance.

National Lawyers Guild

The National Lawyers Guild is a nationwide membership organization of 7,000 lawyers, legal workers, law students and jailhouse lawyers with 105 chapters throughout the United States. Since its founding in 1937, the Lawyers Guild has been dedicated to seeking social equality, freedom to dissent and human rights. The Guild has regularly appeared as amicus curiae in defense of civil liberties and treaty rights of Native people. It is in that context that the Guild supports petitioners in this case.

INTRODUCTION: SUMMARY DENIAL OF THE RIGHT TO LITIGATE FEDERAL COMMON LAW TITLE TO INDIAN LAND PRESENTS AN ISSUE OF NATIONAL IMPORTANCE REQUIRING THIS COURT'S ATTENTION.

Amici take the extraordinary step of moving for leave to appear at the

petition for certiorari stage of this litigation because we believe that a grave and irreparable injustice will occur if the lower courts' dismissals stand. Petitioners will be forever barred from litigating federal common law and Constitutional claims to their ancestral lands. These claims have never been litigated.

Amici believe that protection of Indian lands is integral to a long-standing national policy that recognizes the unique status of the indigenous population of this continent. Amici believe that protection of Indian lands is inextricably bound together with a continuing federal obligation to protect Indian cultures, institutions, and ways of life, expressed in a multitude of statutes and decisions.

Permanent loss of Wampanoag aborigi-

nal lands would indeed be an ironic and disgraceful ending to the history of these people who first welcomed the Pilgrims and made possible the English settlement of America. Doctrines of "standing" and res judicata have been inappropriately applied by the lower courts to deprive Indian petitioners of their "day in court." Amici argue that extinguishment of Indian land title, particularly by unilateral state action, should be sanctioned only after the Indians receive their "day in court," a full and fair adjudication of the merits of every legal issue.

Amici also argue that the federal common law and Constitutional issues petitioners seek to litigate present positions whose significance has long been recognized by this Court.

FACTS

Petitioners have existed on land they now inhabit and claim since time immemorial, and certainly since the time of first European contact with this continent.

Petitioners' first attempt to litigate their land claim, brought under the Nonintercourse Act, 25 U.S.C. § 177, was dismissed for lack of standing, pursuant to a jury decision on this issue. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (Mashpee I).

Petitioners' instant suit, Mashpee Tribe v. Watt, 542 F. Supp. 797 (D. Mass. 1982), aff'd, 707 F.2d 23 (1st Cir. 1983) (Mashpee II), asking declaratory and injunctive relief under federal

Constitutional and common law, was dismissed below on grounds that Mashpee I is res judicata.

Petitioners challenge the unprecedented post hoc shifting by the courts below of the grounds of their decisions in Mashpee I from "standing" to "merits."

Petitioners challenge unilateral state action purportedly converting their tribe into a state town, thereby depriving petitioners of land and rights in common as tribal members.

ARGUMENT

I. EXTINGUISHMENT OF INDIAN TITLE, PARTICULARLY BY UNILATERAL STATE ACTION, SHOULD BE SANCTIONED ONLY AFTER FULL AND FAIR ADJUDICATION OF THE MERITS OF EVERY LEGAL CLAIM AVAILABLE TO THE INDIANS

Extinguishment of Indian title to land must occur within a context of fundamental fairness and due process.

Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Indian Claims Commission, 60 Stat. 1049 (1946). This Court has recognized that the national policy of protecting Indian culture and institutions requires careful scrutiny of procedural rules, particularly where unilateral action purports to extinguish aboriginal rights.

The decisions below, applying the doctrines of "standing" and "res judicata" to prevent the Indian Petitioners from fully litigating their claim to ancestral lands, have denied them fundamental due process, and in so doing, violate fundamental federal principles governing Indian affairs.

This denial of fundamental fairness is exhibited by the deep confusion in the decisions below on the issue of "standing." Petitioners' first attempt

to litigate title to their land was dismissed by the District Court on the ground that Petitioners had "not . . . established its standing to bring suit . . ." Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 (D. Mass. 1978) (Mashpee I). In dismissing the Petitioners subsequent (and current) suit, the same District Court Judge held that "the plaintiff in Mashpee I had standing. . . ." 542 F. Supp. 707, 800 (D. Mass. 1982) (Mashpee II). On appeal of that decision, the First Circuit compounds the confusion by equating standing with "subject matter jurisdiction" holding that:

> the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. 707 F.2d 23, 24 (1st. Cir. 1983).

The confusion in the courts below may originate from the fundamental error in Mashpee I, namely, permitting a jury to determine the question of standing as a matter of fact, contrary to a long line of decisions holding that the question of Indian tribal existence is a matter of law. This Court stated explicitly in Wilbur v. United States, 281 U.S. 206, 221 (1930) that ". . . whether the tribe is still existing. . . (is a) question of law." In United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865),

> In reference to all matters of this kind, it is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this Court must do the same.

In United States v. Boylan, 265 F. 165 (2d Cir. 1920), particularly relevant because the validity of the application

of state law to terminate Indian land rights is identical to the issues the Mashpee raise, the Second Circuit stated:

> Congress alone has the right to say when the guardianship over the Indians may cease. United States v. Nice, 241 U.S. 591, 36 Sup. Ct. 696, 60 L.Ed. 1192; Tiger v. Western Inv. Co., 221 U.S. 286, 31 Sup Ct. 578, 55 L.Ed. 738. Accordingly it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms. Id., at 171.

As a factual matter, Congress has never terminated the Mashpee nor any Wampanoag people, and the Court of Appeals may have been cognizant of the federal judicial policy of deferring to a coordinate branch of government political recognition, when it stated in Mashpee I that its decision was "narrow" and "technical." 592 F.2d at 587. Yet, in its affirmation of the dismissal of

Mashpee II, the instant case, the first circuit has failed to heed this fundamental Indian law doctrine, and, reversing itself, asserts that standing involves "an essential element of (Petitioner's) substantive claim." 707 F.2d at 24.

The policy of the Federal Government under the Articles of Confederation and the Constitution has been to protect Indian governments from the prejudices and misunderstandings of state and local governments; Worcester v. State of Georgia, 31 U.S. 515 (1832), and its progeny. This policy was violated when the courts below first dismissed the Petitioners' claims on the basis of a jury decision as to standing and later barred Petitioners' attempt to cure the alleged standing defect by converting the question of standing to a "decision on the merits" of the underlying land title

claim. [1]

Deep confusion also exists in the decisions below as to the application of res judicata. The District Court in Mashpee II characterized Mashpee I by stating that "The only question reached was whether the plaintiff constituted a tribe entitled to the protections of the (Non-Intercourse) Act." 542 F. Supp. at 799. That court also noted that "the plaintiff was given an opportunity to amend its complaint to state the claims

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[1] The logic of the jury decision itself raises the possibility that the failure to prove standing might be subsequently cured, since the jury decision was a finding that tribal existence was absent on specific dates although present on others. (See 592 F.2d at 579-580.) Presumably, if the Tribe can be found to have come into existence after a period of nonexistence, only to fall into non-existence once again, it may equally be found to have come again into existence on a subsequent date, a possibility foreclosed by treating the standing question as going to the "merits."

of its individual members, but it chose not to do so." Id. Despite these qualifications in the District Court's opinion, the Circuit Court, affirming the order of dismissal in Mashpee II, stated, "the interests of the tribe and its members were fully and fairly represented." 707 F.2d at 24. This assertion by the Circuit Court in Mashpee II is suspect and without foundation especially in view of its decision affirming the dismissal in Mashpee I that the case only involved a "technical issue," 592 F.2d at 587, and that "future cases" Id., at 588, would determine the more basic issues, presumably including the issue of aboriginal title and whether or not it has been extinguished.

There should not have been summary dismissal of petitioners' case even if they had not been specially protected

Indian litigants.

> Under general basic principles . . . a motion for summary judgment on the basis of a prior judgment should be denied . . . if there is a genuine issue of material fact . . . whether (the prior judgment) was on the merits. . . . 2 Moore's Federal Practice, §56.17(52).

Under the circumstances, and recognizing the significance of petitioners' status as Indians, the application of res judicata in the instant case is wholly inappropriate. The only issue even arguably litigated is the matter of standing under the 1790 Nonintercourse Act. Even if the issue of standing were not curable, it is not dispositive of the merits of the federal Constitutional and common law claims raised by Petitioners in their current attempt to vindicate Indian title.

While the District Court recognized the inherent fairness of a "flexible"

application of res judicata to Indian plaintiffs, it nevertheless applied the doctrine inflexibly. In reference to Petitioners' claims of protected Indian title under the Constitution and federal common law, the District Court incorrectly presumed that the determination of tribal existence under the Nonintercourse Act was applicable and dispositive of the standing issue under these other bases as well. "Since plaintiffs do not constitute a tribe, (the claim of inherent Indian sovereignty) is inapplicable." 542 F. Supp. at 806. The District Court's holding that standing is not a curable defect, coupled with the First Circuit's decision that a lack of standing is res judicata as to all the underlying title claims has precluded the Petitioners from having a full and fair adjuducation of their claims to the land

which is the subject of the suit. In sum, Indian title has been extinguished by unilateral state action without a trial on the merits.

II. THE DECISION BELOW IS IN CONFLICT WITH A RECENT DECISION IN THE FOURTH CIRCUIT

The First Circuit decision in this case is completely contrary to a recent decision in the Fourth Circuit. Catawba Indian Tribe of South Carolina v. State of South Carolina, Docket No. 82-1671, decided October 11, 1983. Review of Catawba underscores the harsh and unwarranted treatment the First Circuit has meted out to the Mashpee.

In Catawba, the Fourth Circuit reversed a District Court decision which had granted the state's motion for summary judgment (unreported decision, D.C. S.C., Columbia Div., Civ. No. 80-2050, June 14, 1982). The Circuit Court held

that the Catawba Termination Act, 25 U.S.C. §§ 931, et seq. (1959), did not preclude plaintiff's suit to recover lands under the Nonintercourse Act. The court stated that the termination act had no effect on plaintiff's land claims, neither extinguishing nor preserving them. The Fourth Circuit specifically held that the termination act did not make state law applicable to the tribe, nor did it end tribal existence.

Catawba acknowledges that Indian land rights are so fundamentally important in our federal scheme that they can be terminated only be explicit Congressional intention, which was not present in the 1959 act. In short, the Catawbas will finally have their "day in court."

Upon comparison of this decision with the Mashpee decisions in the First Circuit, the inequities become all too

apparent. In Catawba, substantive law is construed liberally to assure that the Indian claimants will have their "day in court," whereas in the Mashpee cases, procedural roadblocks have repeatedly been erected to preclude any discussion of the merits. This Court must resolve this conflict between Circuits in favor of the long-standing federal policy of solicitude toward Indian litigants.

III. PETITIONERS' CONSTITUTIONAL AND COMMON LAW CLAIMS PRESENT QUESTIONS OF RECOGNIZED SIGNIFICANCE TO THIS COURT

Petitioners present the most fundamental approach to matters of Indian land title since the great Cherokee Nation appeals to this Court 150 years ago. Petitioners' claims antedate the Revolution and the Constitution. They go to the heart of federal jurisdiction over Indian land cases, rooted in basic principles of international law and

sovereignty. As the United States Department of Justice stated in its amicus brief to this court in State of Connecticut v. Mohegan Tribe, 638 F.2d 612 (2d Cir. 1980), cert. denied. 452 U.S. 968 (1981):

> . . . quite independently of any statutory restraints, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and any such attempted transaction is void as a matter of law, without reference to the Nonintercourse Acts. Thus, in this case, the respondent pleaded the ineffectiveness of any land sales under the Constitution, and no decision here of the statutory issue can affect that fundamental objection, not yet addressed by the courts below. Id., at 4-5.

This Court has repeatedly applied these principles, most recently in Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974), wherein was stated:

> The rudimentary propositions that Indian title is a matter of

federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States. . .but this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. Id., at 670.

* * * *

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. (citations omitted) Id., at 668 (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941).

And furthermore,

a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." Id., at 669 (quoting Santa Fe, supra).

In light of these oft-repeated prin-

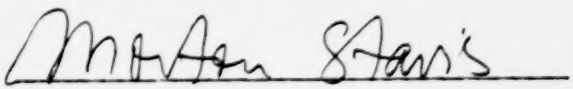
ciples, the disposition by the District Court of petitioners' claim under the Indian Commerce Clause ("Since there is no federal statute which protects plaintiffs here, preemption is not applicable." 542 F.Supp. at 806.) lacks any justifiable foundation.

The Mashpee, like the Oneida prior to this Courts' decision in 1974, have been blocked by jurisdictional doctrines inappropriately applied. The Mashpee, like the Oneida, have a right to present their claims. Failure of this Court to review and reverse the prior proceedings in this case would work a fundamental and irreparable injustice.

CONCLUSION

This is an important case which presents an issue of gross inequity to Indian litigants, and abuse of the rules of civil procedure. It is also an

appropriate case in which this Court may resolve a conflict between the Circuits regarding a fundamental principle of federal Indian law. The writ of certiorari ought to be granted.



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